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CRIMINAL RESPONSIBILITY AND PUNISHMENT FOR SUICIDE.

The somewhat unusual verdict of *felo de se* was brought in by a coroner's jury in England recently. Though the consequences of this verdict are by no means so harsh at the present time as would have been the case a century ago, it cannot be denied that they necessarily entail a good deal of additional pain to the relatives of the suicide. The *Solicitor's Journal* in speaking of this case, said: "Before the statute 4 Geo. 4, c. 52, the body of a person *felo de se* was interred at night in a public highway, generally at a cross-road, with a stake driven through the body, and no rites of Christian burial were allowed. That act prescribed that the coroner should direct the interment of such person to take place in consecrated ground within twenty-four hours between the hours of nine and twelve at night, but gave no powers for the performance of Christian rites. This provision was repealed by the statute 45 & 46 Vict. c. 19, and re-enacted with the omission of the limitations as to time, though it is still necessary for the interment to take place after sunset. The latter act provides, by reference to the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 13, for the use of such prayers as may be prescribed or approved of by the ordinary, a provision which also applies to persons dying unbaptized or excommunicate, but the full Christian service is still forbidden by law. Logically, a person *felo de se* is guilty of self-murder, and the form of the finding of the jury, 'that the said C. D. did feloniously kill himself,' is similar to that in ordinary cases of murder. But in general a coroner's jury will endeavor to temper justice with mercy to the relatives of the suicide, as far as is consistent with their oaths, and it is only in cases of indubitably wilful self-destruction that they do not return a verdict of 'suicide whilst of unsound mind,' a verdict with which the rites of Christian burial are compatible."

In the United States none of the common law penalties for suicide are in force. The peculiarity of the offense necessitates its punishment upon innocent parties, which sort of punishment is not at all approved in this country. Nevertheless, the act of deliberately killing oneself, while not punishable as a specific crime, is still unlawful and criminal as *malum in se*. Commonwealth v. Mink, 123 Mass. 422, 25 Am. Rep. 109. So, that where two agree to commit suicide together, and one survives, the survivor is guilty of murder, as accessory to the killing of the other. Reg. v. Jessop, 10 Crim. L. Mag. 862. And likewise, where one in attempting his own life accidently takes the life of another, he is guilty of homicide; or where one advises or aids another to commit suicide, he is himself guilty of murder. Blackburn v. State, 23 Ohio St. 146; Commonwealth v. Bowen, 13 Mass. 356, 7 Am. Dec. 154; State v. Ludwig, 70 Mo. 412. These instances, together with statutes making an attempt to commit suicide a felony, are the only attempts to correct this terrible practice, which the legislatures of the states have thought wise to make. The statute, mentioned in our quotation as being enforced in England, we believe lays the punishment for this offense altogether on innocent relatives. To deny the deceased a Christian burial, or the rights of his loved ones to extend those last of the kindly ministrations of life to one whom they love, and, finally, to bring upon the relatives the disgrace of being compelled to bury the deceased in the darkness of midnight, all these have but one tendency,—to lay the hand of the law with unnecessary and inequitable heaviness upon those not at all responsible for the criminal act. We are therefore inclined to commend the fairness of American courts and legislatures in setting such narrow limits to the harsh rule of the common law on this question.

NOTES OF IMPORTANT DECISIONS.

DYING DECLARATIONS — WHETHER ADMISSIBLE IN EVIDENCE WHEN SOME STATEMENTS THEREIN WOULD NOT BE ADMISSIBLE.—It is a general rule that dying declarations must be such narrative statements as would be admissible had the dying person been sworn as a witness. A difficult question is presented when, although the main statements of a written declaration made *in extremis* are perfectly competent, certain parts of them would not be admissible if the witness were giving his testimony on trial in open court. The alternatives are (1) to admit it as a whole, or (2)

eliminate the objectionable features, or (3), exclude it altogether. In the recent case of State v. Carter, 32 South. Rep. 183, the Supreme Court of Louisiana, after wrestling with these three alternatives preferred the first, and heldgenerally that a dying declaration must go in as a whole, and is not rendered inadmissible because some of its statements of themselves, and if standing alone, would be inadmissible. The court dismissed the third alternative as contrary to the policy of the law, and the second as violative of the rule against fragmentary declarations. They accept the first as most just to both the state and the accused, although in this case it violated the rule that dying declarations must be confined to the circumstances of the killing. On this point the court's argument is interesting:

"The dying declaration is a peculiar species of evidence admitted *ex necessitate*, in flagrant violation of all the ordinary rules of evidence. It violates the rule against hearsay; it has not the sanction of an oath; it cuts off the opportunity for cross-examination; it rides roughshod over the sacred constitutional right of an accused to be confronted with the witnesses against him. To all these grievous faults it may add the inherent infirmity of emanating from impaired faculities, benumbed already, or disordered by the panic of momentary death. All these objections are overborne by the one consideration of public policy that society may not be deprived of the evidence such as it is, and whatever it may be worth. After all this, is the declaration to be excluded simply because the dying man has wandered off to some matters not pertaining to the immediate circumstances of the killing? Verily, if the law, so decided, it would have strained at a gnat after swallowing a camel."

THE CORRECT DOCTRINE OF STARE DECISIS.

Perhaps I may not be overestimating the importance of my subject when I say that there is not, among the entire Anglo-Saxon race to-day, a question which more deeply and vitally affects and concerns them than that of which I shall endeavor to treat — a question which concerns both their present and future welfare, their fundamental rights of private property, and even their very equality before the law. In fact, it may be truly said that *stare decisis* plays so important a part in our law at the present day that a knowledge of its true doctrines is essential to a knowledge of the law itself. Unhappily, however, a knowledge of these true doctrines, clear in principle as they are, cannot, because of the accumulated rubbish of ill-considered cases under which they have become partially buried, be easily and readily acquired. Singularly as it may seem, these beneficent doctrines which received their very birth in order "to keep the scale of justice even and steady and not liable to waver with every new judge's opinion" have themselves become to some extent a victim of that enemy which they went forth to destroy. They have become so entangled with a great mass of discordant decisions that, upon first glance, it appears to be about as uncertain as to what the real doctrines of *stare decisis* are, as it ever could have been, with respect to the law itself. Amid such surroundings, Tennyson's well-known picture borrows nothing from poetic coloring, but is severely drawn with the sober pencil of a judge:

> "The lawless science of our law,
> The codeless myriad of precedent,
> That wilderness of single instances,
> Through which a few, by wit or fortune led,
> May beat a pathway out to wealth and fame."

But when we clear away the chaff, and understand and appreciate the very heart and soul of *stare decisis*—the true doctrines of which it is composed — we view it in an altogether different light. So perfect and uniform in principle, as well as in theory, are the true doctrines of *stare decisis* that they are unaffected by their contamination with false and erroneous utterances, and upon careful investigation are found to shine forth in all their grandeur and brilliancy as a distinct, perfect and harmonious system of principles which will preserve, protect and maintain the stability, certainty and symmetry of any system of jurisprudence.

Law is something higher and nobler than a mere collection of rules. Those who expect to find somewhere all the law in black and white fail to grasp its true significance. Tongue has never formulated it completely; pen has never fully written it down; mind has never fully comprehended its meaning, for no one has ever been able to accurately define it. The ideal conception of law is that of a perfect and uniform science — a science composed of an harmonious body of legal principles, and each of those principles so perfect in itself that it blends with every other naturally and evenly unto the formation of one consistent and seamless whole. This is "the secret root from which it draws all the juices of life." In fact, so important is this conception to any system of jurisprudence that the administration of justice is found to be attainable only in so far as the object of this conception — uniformity — continues to exist. So sacred is this conception, that the name of law cannot rightfully be given to a series of unrelated and inconsistent commands enforced by uncertain and arbitrary methods, and in utter disregard of reason and of principle. The capricious orders of a crazy despot may be laws according to Austin's definition, but if so, as has well been said, "it is the worse for the definition."

The science of the law bears a most striking resemblance to and may fairly claim kindred with the inductive sciences. In natural science, it is absolutely essential, before we can take any step or achieve anything — in fact, before we can have any science at all—that we have an all-embracing fundamental assumption. This assumption is that

nature is uniform. And relying upon this uniformity we believe, with implicit confidence, that like conditions will always produce like results. We act upon the assumption that whenever the same conditions present themselves they must give the same identical result, and we refuse to entertain or consider any supposition to the contrary. We acknowledge this uniformity as the very foundation stone of science, without which the knowledge of past events would be unavailable, and no certain results could be ascertained for the future. In considering the science of the law, the same corner-stone of uniformity is likewise essential. The same fundamental assumption that the same thing always happens under the same conditions, in the same way, and produces the same results, is no less needed. It is essential to the legal science that we have a fundamental uniformity of law corresponding to the fundamental uniformity of nature. But when we take a step farther, and endeavor to obtain the benefits of such uniformity in the law, a notable distinction at once strikes us. There is no natural or supernatural force sustaining the uniformity of law. Law is declared, expounded and controlled by man. Man is but human, and humanity, because of its fallibility, cannot attain for the legal science the full character of uniformity possessed by positive laws. But, since man has the power to declare and control the law, so he can, if he will, control in a great degree the uniformity of the principles of that law—and the method by which he can protect in a large measure the uniformity of human laws is by an adherence to the true doctrines of *stare decisis*.

Theoretically speaking, "judicial power as contradistinguished from the power of the law has no existence." It is never exercised for the purpose of giving effect to the "will of the judge," but only to give effect to the "will of the law." Following out this principle to its legitimate conclusion, we would have an administration of the law which is as perfect and uniform as we regard the law itself. Under such conditions, the beneficent doctrines of *stare decisis* would be superfluous. But, however amiable may be the intentions of our judges and their desire to exercise their judicial power only in accordance with the will of the law, we cannot shut our eyes to the undeniable truth that they are only human, and that their judgments are therefore but fallible. And so, as our judges are not and cannot be perfect in the wisdom of the law, it naturally and necessarily follows that they cannot be all-wise in the administration of that law. A man cannot administer perfectly that which he does not as perfectly understand. Wisely and truly, therefore, has it been said that it is impossible for humanity, because of its humanity, ever to enjoy the full blessings of that uniform, harmonious system of law which is its highest ideal; but none the less has it also been recognized that in so far as that uniformity is possible of attainment, then just to that extent, in that degree, is it essential to our jurisprudence that it should be attained. In the earliest history of the courts, this ideal of uniformity in the law was unthought of and unheard of. No one at that time had the slightest conception of it. And, as "the heart does not crave what the eye does not see," so they rested contentedly and made no efforts to attain the benefits of that higher ideal which was unknown to them. The judges would view the law solely in accordance with their private opinions and dictates; they would declare these private opinions and dictates as the law; and they would administer and enforce what was thus declared as law, without regard either to their predecessors or to their contemporaries. In fact, this condition existed for many centuries.

Perhaps the first trace we have of any departure whatever from the doctrine that each judge was himself all wise in the knowledge of the law, is to be found in the early growth of Roman jurisprudence. But even here the departure was but slight. They took away from their judges none of the power which they had previously wielded. The judges would simply examine the opinions of distinguished lawyers and text-writers as an assistance or guidance to them in the determination of doubtful questions — not that the text-writers or distinguished lawyers were considered to possesss a greater knowledge than, or even an equal knowledge with, the judge himself, but only that their opinions might prove to be of service to him in formulating his own independent opinion. In fact, these opinions of others were not in any sense regarded as binding upon the judge, and would receive only the weight to which he considered them to be entitled by virtue of their inner reason and logic. The conception of the force and effect of precedent was as unknown to them as to the ancients. The theory was to elevate the standard of wisdom already possessed by the judge by acquainting him with the wisdom of others of distinction and learning—in other words, they would look for guidance in new questions to the treatment of similar difficulties which had gone before.[1]

We thus have, imperfect as it is, our first practical conception and adoption of precedent as constituting a beneficent aid in the administration of the law. And, while it is no doubt true that they did not share in the slightest degree our ideal conception of a uniform and harmonious system of law—every principle and doctrine of it a part of the same root, a sprout from the same soil, and a branch from the same tree—yet we must in all justice give them credit for the advance which they did actually make in our jurisprudence. Their aim and object was to attain a higher degree of wisdom in the bench, and in so far as they were successful in their endeavor they necessarily lessened its scope of human error; so that to the same extent that human error was removed from the administra-

[1] Sir Frederick Pollock, Essays on Jurisprudence and Ethics.

tion of the law it logically and conclusively followed that the administration of that law, its uniformity and harmony, was to become more enlightened and placed upon a higher plane.

In the English law, even so early as the Conquest, we find the memory of past events reckoned up as one of the chief qualifications of those who were to be instructed in the best law of the country.[2] But the conception of precedent as possessing any binding force or authority had no recognition in the jurisprudence of any country until after the reign of Edward I.[3] In fact, the earliest use of judicial proceedings, contradistinguished from the opinions of lawyers and text-writers as precedents is said on the authority of Guterbock on Bracton and His Relation to the Roman Law to have been by Bracton about the time of Edward I. It would, however, says Gutcrbock, be too hazardous to conclude that the value of such decisions was not recognized in practice at an earlier day. During the reign of Edward I. Bracton achieved the then marvelous feat of citing some five hundred cases from the judicial rolls, but in doing this he was quite alone, and we find that his successors, Fleta and Britton, abbreviated his work by omitting citations. And not only was he alone in his new practice, but he himself entirely lacked our modern notions of authority.[4] Bracton tells us that he set himself to peruse the ancient judgments of the justices because his ignorant and uneducated contemporaries were misrepresenting the law, and he appealed from them to the great men of the past, Martin Pateshull and William Raleigh.[5] These precedents were not referred to as binding, but only as instructive of the past. The judges would regard themselves as having an implicit knowledge of the law and would not even feel bound to argue about past cases. So prevalent was this idea of implicit knowledge, that even the knights who were employed to take assizes in their shires, though they had never read a word of law, would believe that they possessed an equally implicit knowledge of it.[6] But precedent was not long to be treated with such irreverence, and we find that throughout the whole period of the Year Books, from the reign of Edward III., to that of Henry VII., the judges were incessantly urging the sacredness of precedents, that a counsellor was not to be heard who spoke against them, and that they ought to judge as the ancient sages taught. In the time of James I., the court of King's Bench observed that a point which had been often adjudged ought to rest in peace.

Thus at a time which we may justly term the very infancy of our law was there inculcated into our institutions the doctrine of the inviolability of the precedent.[7] Thus, had we made a step forward in the onward march of jurisprudence which has never been and never will be really and truly regretted. Thus did there glitter forth to the Anglo-Saxon race a companion of the law which has ever since proved itself to be its greatest friend and truest protector. It is needless to hesitate as to the name to be given this new-born and worthy companion of the law—this almost immortal something, possessing equal dignity, I may say, with the law itself. Its name is mirrored forth from its inner nature—*stare decisis*. True, at this early period we had not the doctrine of *stare decisis* in its present perfected state. We did not truly understand it as it really is. We had merely the infant doctrine in its state of birth. But, as certain as night follows day and day follows night, just so certain was it that this infant doctrine would grow and develop into its better and higher self as we see it to-day. Wisely has it been said: "The life and soul of English law has ever been precedent."[8]

Having thus traced the origin of *stare decisis* as recorded in history, it is perhaps as well, before beginning my discussion of its true and real doctrines, to call attention to the true reason of its existence as well as growth and development. It is none other than public policy—that beneficient body of principles, that corner-stone upon which all national institutions must be built, that essential and fundamental part of the law of every land—and it is to this guiding light, this guardian and protector, this true fountain to which we must always apply for relief whenever we are met with difficulties concerning the real doctrines of *stare decisis*. Let us keep this truth always in mind throughout our consideration of the subject to which these pages are devoted, and it is believed that we cannot fall short of true results.

Entering now upon the discussion of the true doctrines of my subject, I propose to lighten its burdens at the outset by first considering and disposing of the two extreme propositions which have been enunciated, but neither of which has any true foundation in principle: first, that denying any force or power to precedent, and second, that, asserting the absolute and unqualified inviolability of precedent.

The first of these extreme propositions is well exemplified by the theory of modern civilians, accurately expressed in the elaborate and much cited article of Jordon,[9] from which the following is an extract: "Judicial usage as such, that is, by reason of its being judicial usage, has formally no binding force, and is material only and of so much value as on the principles of sound jurisprudence belongs to it by reason of its inner nature; and hence a court cannot be bound to follow its own usage or the usage of another court las a rule of decision, but rather has the duty to

[2] Blackstone's Commentaries, vol. 1, p. 69.

[3] Pollock & Maitland's History of English Law, vol. 1, p. 183.

[4] Pollock & Maitland's History of English Law, vol. 1, p. 209.

[5] Bracton, *f. l.*, 2.

[6] Pollock & Maitland's History of English Law, vol. 1, p. 183.

[7] Kent's Commentaries, vol. 1, p. 473.

[8] Freeman Eng. Const. ch. 2, 3.

[9] Archiv. fur civil Prac. 191, 245 *et. seq.*

test every question with its own jurisprudence, and ought to apply usage only when it can find no better rule of decision."

They thus deny that there is any power or force whatever rightfully possessed by a precedent, as a precedent, but only in so far as it accords with sound reason. They probably base their opposition upon the true, but often misunderstood, maxims that: "The reason of the law is the soul of the law," and that "nothing is law that is not reason." They seem to entirely lose sight of the distinction which exists between the reason of the judge and the reason of the law. They do not seem to realize that the reason of Titius may and often does differ from the reasoning of Septimius. They do not seem to realize that by abolishing jurisprudence and legal principles and surrendering our property, our liberties, our persons—aye, even our very lives, absolutely and unreservedly to the ever-changing opinions of ever-changing judges, we place ourselves completely at their mercy, make uncertain the administration of the law, convert the courts themselves into theaters of political strife, and destroy every vestige of republican institutions—setting up a judicial oligarchy in their stead. They do not seem to realize that under such conditions our jurisprudence would be one vast game of lottery and we would embark with our lives, our liberty and our property upon the endless wheel of chance. Nothing can be more perilous to any prudent and well-regulated enterprise than a consciousness that the laws by which its results are to be governed are fluctuating and uncertain. The fundamental conception of a judicial body, said one of the ablest judges of our present day, is that of a tribunal hedged about by precedents without regard to the personality of its members.

Considering now the second of the extreme propositions, namely, that of the absolute inviolability of precedent, it is believed that a proper and fair statement thereof can well be made in the language of Sir William Jones: "No man who is not a lawyer would ever know how to act; and no man who is a lawyer would, in many instances, know how to advise, unless courts were bound by authority as firmly as the pagan deities were supposed to be bound by the decrees of fate."

With all due respect to such eminent authority, I believe it may be stated as a sound proposition that the general doctrine of the absolute inviolability of precedent cannot be justified under any system of jurisprudence. We must recognize that, by giving binding force to a precedent because it is a precedent for the purpose of promoting uniformity, we are only securing uniformity in decision, or, in other words, uniformity in what has been conceived to be law—not uniformity in the law itself. Realizing, therefore, that a decision may or may not declare the true principle of law involved, and that uniformity in decision constitutes uniformity in the law only in so far as that decision itself accords with the law, we are forced to the conclusion that a decision must not be always blindly followed merely because it is a decision. A precedent against law, instead of tending to produce by its authority uniformity in the law, may signify no more than that the like injustice has been done before.[10] And if a precedent is to be always blindly followed because it is a precedent, even when decided against an undoubted rule of law, there can be no possible correction of abuses, because the fact of their existence would render them above the law.[11] That zealous, eloquent and potent friend of establishments, Burke, in his anxiety to preserve the fabric of true institutions by the removal of whatever was likely to impair or endanger their foundations, has spoken very forcibly and with very little reverence concerning the blind following of precedent, in the following language: "There is a time when men will not suffer bad things because their ancestors suffered worse. There is a time when the hoary head of inveterate abuse will neither draw reverence nor obtain protection."

Every part of the law is a wholesome branch from the same tree, rooted in a deeper soil than the accumulated rubbish of cases, and, as said by Lord Mansfield, our law would be an absurd science were it founded upon precedent only. That great and learned English Judge, Chief Justice Vaughn, has also spoken very decidedly upon this subject. He said: "Precedents are useful to decide questions, but in such cases as depend upon fundamental principles from which demonstrations may be drawn millions of precedents are to no purpose." The doctrine of the absolute inviolability of precedent can therefore be sound only in so far as, and to the extent that public policy demands that it should be so. We must always bear in mind that the following of what proves to be an erroneous precedent merely because it is a precedent can hardly promote certainty in the law. Steadiness in the practice of the courts it may promote.[12] We must also reflect upon another fundamental truth that in following the dictates of a prior decision merely because it is a decision we are depriving the subsequent litigant of his power to defend his own rights, his own possessions and his own property by a presentation to the court of his own best reasons why injustice has been or is about to be done him; we are pre-judging his case; we are depriving him of his right to a hearing before our courts of justice upon the law of that case; we are compelling him to be bound and abide by what another person, having no privity whatever with him, has been instrumental in having adjudged—another situated in the same way perhaps with respect to the question involved, but with respect to the presentation of the merits of that question such prior litigant may have been so differently situated from him as that the full

[10] Bishop Burnet, 6 How. St. Tr. Rep. 142.
[11] 16 Viner Abr. 499.
[12] Am. L. Rev. vol. 1, p. 641.

merits of the cause were not presented to the court with their greatest strength and considered in their fullest aspect.

In this connection, it is well to recall that even under the doctrine of *res adjudicata*, limited as it is to parties and their privies, no attempt is made to deprive a person of the right to be once heard before the law. It merely declares that, when he has been once heard, neither he nor those in privity with him shall have the right to delay justice by a renewal of the self-same controversy. But under the doctrine of *stare decisis* we go much further and declare that in certain cases a litigant —no matter whether he was even living at the time of the rendition of a prior decision, and no matter whether he has ever had the power of being heard upon the question or not—shall be absolutely bound by such prior decision if it happened to dispose of the same identical question or principle upon which he is relying. The conclusion is, therefore, inevitable that this deprivation of private right—of the right to a hearing before a court of justice — while clearly recognized in proper cases upon grounds of public policy, must be confined within proper limits and can only be justified in so far as public policy does actually demand it.

In order to do justice to my subject, I believe I ought to state here that comparatively few of the phases of this beneficent doctrine of *stare decisis* have this iron-clad quality of the absolute inviolability of precedent, and such inviolability has no recognition in any event unless the need therefor is clearly felt and believed to be of the utmost importance to the public welfare. It is the purpose of these pages to survey and plat the extent of these various doctrines and to show their entire consistency each with the other in the accomplishment of the same general end. And first let us observe that all the expressions contained in a decision are not made binding or conclusive. It is the principle extracted from a decision which alone has binding force and authority. Says Lord Mansfield: "The principle or spirit of cases make law; not the letter of particular precedents." The mere *dicta* of a judge in deciding a case is of no authority whatever, and the inferior courts can disregard it entirely, in their own best judgment. It is true the *dicta* of a judge gives an inkling of what his decision would likely be in the event such modified, collateral or extraneous question should come before him for determination, and is for that reason entitled to some respect, at least as much so as the decisions of courts of foreign jurisdictions. But such casual or collateral comments are not binding.

When a principle of law is litigated before a judge—who is of course but fallable and can never know all the law or even remember the half of what he has known—he naturally and necessarily makes a careful study of that particular principle in so far as it affects the concrete case before him. And he has the benefit of the research, study and conclusion of the counsel for the respective parties. So that, it is fair to presume that the judge will have acquired a very clear conception of the precise principle involved before he decides the case. Such, however, is in no sense true with respect to *dictum*. *Dicta* may represent merely the general personal opinions or sympathies of the court—the mere theoretical deduction of the mind of a judge as to collateral matters which cannot even be said to have been litigated. To compel subsequent suitors to be bound by such expressions of opinion to which the judge has probably not given a moment's consideration would neither promote individual justice nor have a beneficial influence upon the stability, the symmetry or the uniformity of the law. The very name *stare decisis*, signifies that it has to do only with real decisions, and chance or collateral hints constitute nothing to be relied upon subsequently. This is the well-settled doctrine both in this country and in England.[13] Unfortunately, however, one of the English courts and a few of the inferior of our American courts have endeavored to lay down a qualification to our sound principle upon the subject of *dicta*, and this they attempt by giving utterance to the untenable doctrine that where a *dictum* of law has been accepted and is likely to have affected divers contracts and dealings between man and man, and, if not followed, many transactions done on the faith of it, would be disturbed, the courts should follow the *dictum*; so, that even though they have not the merit of having regarded legal principles accurately they are considered to become ultimately clothed with, or substantially with the strength and importance attached to precedents.[14]

It is difficult to perceive the line of reasoning they pursue in arriving at such a conclusion. The mere *dictum* of a judge is recognized and acknowledged to be of no greater force as a binding precedent than if it had remained unuttered. But they would have us believe that the acceptance of such *dictum* by individuals, in virtue of which their contracts and dealings are affected, should give binding force to that which was previously without recognition. They base their doctrine upon an alleged analogy between it and the following of an erroneous decision upon the ground that to do otherwise would injuriously affect property rights acquired under it. But it is clear that no such analogy subsists. With respect to an erroneous decision, the individuals are not to blame. Human affairs have to progress and titles have to be built up in accordance with existing decisions. So, that if there is an erroneous decision, which affected the building up of titles, greater injustice would be done by an attempt to afterwards divest title acquired on the strength of it. Such titles so acquired must be permitted to stand as a matter of the past; and errors in the future can well be provided against by legislative enactment. But, with respect to *dicta*, every individual knows, or is conclusively presumed to know, that it forms

[13] 3 How. 292; 7 How. 614; 3 H. L. C. 391.

[14] 26 Ch. D. 821; 34 N. J. Eq. 439; 7 S. W. Rep. 36.

no part of the decision of the court—that it is merely a casual remark, reason or comment which could as well have been left unuttered—that it is not binding upon any other tribunal—and that if they acquire property rights upon the faith of such *dicta* they must do so at their peril. It would be the rankest injustice to those individuals who had recognized the true legal *status* of this *dicta*, and framed their titles in accordance with what the law really was, if such *dicta* were to be afterwards made binding—however erroneous in principle it might be, and merely because of the negligence of other individuals in putting faith in that upon which they had no right to rely; as a result of which the titles of such negligent individuals would be upheld, while those of the prudent man who had applied himself and understood the true state of affairs, and had acted accordingly, would be overthrown. It is needless to remark that there is no principle of public policy which subjects the rights of the prudent to the wrongs of the negligent, and this same remark is true regardless of how numerous those negligent claimants might prove to be. In the orderly treatment of our subject, the next question which presents itself is as to whether the mere fact that the point decided was directly involved in issue is sufficient to establish the authority of a decision as to third parties in subsequent litigation. The affirmative of this question is supported by Am. & Eng. Ency. of Law,[15] as follows: "It need not be that points decided must have been fully and completely considered in every detail, in order that they may be regarded as decisions and not merely as *dicta*. The determining point is rather whether the issue is directly involved in the case than whether it has been exhaustively considered.[16] This doctrine of the text thus quoted relies for its support upon the cases cited; but when we examine such cases we find that they utterly fail to sustain such proposition. The latter three of the four cases cited have no bearing whatever upon this particular question. The only phase of *stare decisis* which they in anywise refer to is that the language of a decision must be considered as referring to the particular case decided. And, with respect to the first case cited, not only does it not support the doctrine there laid down, but it is in direct contravention of it. The court in that case laid down emphatically, as a qualification to the rendering of a decision binding as a precedent, that it should have been "investigated with care and considered in its fullest extent," and it quoted this requirement from the earlier case of Alexander v. Worthington,[17] where the court had said: "All that is required therefore to establish the authority of any decision is that the 'very point' decided was 'actually before' the mind of the court, and was 'investigated with care and considered in its fullest extent.'" It is to be further observed in this connection that these words "investigated with care and considered in its fullest extent," constitute an original quotation from the decision of the United States Supreme Court in Cohens v. Virginia. The true doctrine deducible from such decisions, therefore, would seem to be that the mere fact that the very point decided was actually before the court is not of itself sufficient to establish the authority of such decision, but, that in addition the point, must have been "investigated with care and considered in its fullest extent."

But other authorities have given utterance to a qualification of greater dimensions. In Laws and Jurisprudence[18] it is said: "Indeed the doctrine of judicial precedent implies that the point of the decision, wherever such force is attributed, should have been argued by opposing counsel. So important is that consideration that it might almost be suggested as a wise rule to apply to the use of judicial decisions as precedent that no case should be held to acquire binding force as law unless the point on which it was decided has been argued by counsel." This doctrine is further supported by a decision of one of our United States Circuit Courts[19] as follows: "No decision as it seems to us can amount to a precedent unless made after full argument." Such position is certainly not altogether without merit. The Supreme Court of the United States has time and again made reference to the fact that a case has been fully argued as constituting a reason why the decision rendered therein should be regarded as settled. Particularly was this so in Wright v. Sill,[20] where the supreme court, in declining to reconsider a question, gave as a reason therefor that: "The argument upon both sides was exhausted in the earlier cases. It could subserve no useful purpose to again examine the subject." It must be observed, however, that the United States Supreme Court has never laid it down as doctrine that it was essential that a point in decision should have been argued by counsel in order to be considered as having any authority. It merely recognized that in cases where such full argument had actually been had they considered themselves justified in declining to again reconsider the question. But the converse of the proposition—whether a decision must have been rendered after argument in order to constitute an authority—has never been considered by the supreme court.

The principle upon which the doctrine last related is based is no doubt, that heretofore referred to, namely: that the recognition of binding force in a decision constitutes a deprivation of the otherwise well-established right of a litigant to have a full hearing before a court and to present his case in his own best way; always remembering, however, that, if such prior decision had really and truely presented the full merits of the

[15] 1st. ed. p. 21.

[16] Michael v. Morey, 26 Md. 261; 90 Am. Dec. 106; People v. Winkler, 9 Cal. 236; Pass v. McRae, 36 Miss. 148; Holcomb v. Bonnell, 32 Mich. 8."

[17] 5 Md. 489.

[18] p. 233.

[19] 25 F. 451.

[20] 2 Black. 544.

question now sought to be raised, and had been rendered only after a thorough and careful investigation, then public policy could properly step in and demand that weight should be given to it—as to whether it should be completely or partially binding, of course, depending upon considerations hereinafter dealt with. But they say, when we encounter the further state of affairs that, not only is this later litigant not given a full unembarrassed hearing upon his question, but that such prior decision, affecting, as it does, his very rights, was not itself rendered after a full argument, we are brought within the domain of the unaided opinion of the judge, often recognized as it is to be but imperfect and fallible. From a consideration of both of the doctrines thus laid down and supported by authority, we are driven to the conclusion that the mere fact that a point was directly in issue does not establish its authority as a precedent; but that in addition either one of two elements must be present, either the point must have been argued by counsel before the rendition of such prior decision, or it must clearly and affirmatively appear that the court itself investigated the point with care and considered it in its fullest extent. The presence of either of these elements must surely suffice, as the sole object of requiring that a case shall have been argued by counsel is, in order that we may be reasonably certain that the point was "investigated with care and considered in its fullest extent." The word "fullest" is, of course, intended to have a proper and reasonable construction, not a technical one.

I have been led to adopt the above conclusion for the further reason that it has been estimated upon excellent authority, that one-third of all the decisions rendered by courts, even after full argument or full and careful investigation and consideration by the judges, are always reversed in the higher court. So, that, when we contemplate what the proportion of error would be in opinions which have not even had the benefit of this argument by counsel, or this full consideration and investigation by the court, it is believed the result would be simply appalling. We should hesitate before we close the development of the law and the rights of our citizens without any real hearing at all. Deprive them, if you will, of the power to again discuss a proposition which has been previously well considered and thoroughly investigated, but, let there have been such full consideration and investigation before we attempt to do so. Let there have been either an argument by counsel or some reasonable showing that the point in decision was "investigated with care and considered in its fullest extent" by the court, before the mouths of our citizens shall be closed. The mere opinion of a judge, without any other showing, is too unreliable to have given to it any real weight. It is far better to have a disagreement between the authorities than to perpetuate an error which we know certainly, as likely, and perhaps more likely exists than not, to perpetuate an absolute variance with the symmetry of the whole body of law.

Our inquiries now bring us to a discussion of the degree of force which should be given to a prior decision under varying conditions. In the first place, let me remark that if a decision is deemed to be correct, it is always entitled to be followed for its correctness, and the doctrine of *stare decisis* would in such instances remain for the time being dormant. The object of *stare decisis* is not to deprive our judges of their right to reason upon the logic of the law. Anything which materially interferes with such a privilege of the judge would prove a serious blow to the welfare of our people, would have an injurious effect upon our whole system of jurisprudence, and would most vitally affect our national existence, prosperity and development. We will always have need of broad-minded judges, men whose knowledge extends beyond the mere letter of cases, men who can treat the subject of the law as a science rather than a mere collection of abstract rules, men who have deeply embedded in their minds that grand system of reasoning which is not unlikened to the reason and wisdom of the law itself. It is the realization of this fundamental truth which constitutes an important factor in the attainment of the ends of *stare decisis*. It is the very acknowledgment of this truth which impels us toward our goal. It is this very acknowledgment which, and which alone, has made the development of our jurisprudence possible. And so, as has been before remarked, comparatively few of the doctrines of *stare decisis* impart to a decision absolute authority. They aim to attain the benefits of the broad-minded reasoning of our judges in the most effective manner. While we would not for a moment think of interfering with or impeding the generous use of this reason by the judge, still it must be apparent that we can not give effect to the particular deduction of each and every of our judges. What we desire is the collective wisdom of them all. And thus it is that we must give preference in the administration of our law to the decisions of superior courts over those of inferior jurisdiction; thus it is that we give respect to the decisions of our co-ordinate courts, unless, and until they are found to be erroneous and an obstruction to the accomplishment of that higher wisdom; thus it is that we give respect to the previous decisions of the very court itself until ascertained to have been rendered in error; and thus it is that we expand and develop our jurisprudence and attain, receive and enjoy some substantial blessings from both logic and uniformity.

It is only in respect to the doctrines of *stare decisis*, concerning business rules and settled property rights, that the above principle cannot be taken advantage of. Here we are forced to admit that what a rule of title or business mean, or what it does not mean, are alike comparatively unimportant to our people. It is the ele-

ment of certainty and uniformity which is of prime importance. We cannot say to our people, True I told you yesterday that your title would be perfect if you did thus and so, and you built up your title on the strength of it, but to-day I have discovered my error and that error cannot help your title. We cannot speak to our people in the words of Mrs. Browning's maiden to her lover:

"Yes, I answered you last night,
No, this morning, sir, I say.
Colors seen by candle light
Do not seem the same by day."

For they say in reply: The fact that you erred is to be regretted, but your error must not be permitted to affect our settled property rights. We do not wish to perpetuate a breach in the uniformity of the law, and the legislature can provide against such error for future time, but in all reason and justice that error of the past must remain undisturbed in so far as affects property rights which have been settled upon the strength of it. The reason and logic of the judges are not impaired by such doctrines of justice and public policy, but they are rather caused to admire the sound logic which prevails throughout our jurisprudence.

Progressing onward in the consideration of our subject, I may next observe that the decisions of courts are of no real authority outside of the structure of government under which they are organized. The courts of one country can not render decisions which shall thereby be deemed binding upon any other country, except in so far as that former country or state may have been a parent to the latter. and even then only in respect of decisions rendered prior to their separation, or where, though such former country may not have been a parent country to the latter, yet a statute thereof is adopted by such latter, in which event, of course, such statute would be interpreted by the decisions of the former state or country which had been rendred prior to the adoption of such statute by the latter, but not by those rendered subsequently to such adoption.[21] A decision of one state or country. generally speaking, should be followed in another state or country only in so far as its cogent and convincing reason may seem to entitle it and not because it is regarded as authority.[22] It is entirely foreign to our purpose here to go into a discussion of the particular extent of the jurisdiction of our state and federal courts, as whatever may be the degree of preciseness with which this question may be determined the main proposition is clear and firm that each is supreme in its individuality.

There is one general principle under the doctrines of *stare decisis* which is uncontroverted by any authority, and in determining the extent to which one decision is held binding upon subsequent litigation it is better to first lay down this undisputed doctrine. It is, that wherever there exists an equipoise of doubt in the mind of the subsequent tribunal concerning the question before it, whether that tribunal be of co-ordinate or even superior jurisdiction with respect to the prior decision and even though that tribunal be the same that determined the previous controversy and even though the same judge be still upon the bench, the natural presumption while that doubt lasts is that the former decision was correct, and it is the duty of such subsequent tribunal to act accordingly; this for the reason that where there is a simple choice between uniformity and discordancy the former is always to be adopted.[23]

Taking up now for consideration the degree of weight which is to be accorded the decisions of appellate courts by inferior ones, it is to be observed that the civil and common law are in exact accord in respect to one phase of the question. They both hold that the decision of an appellate court is of absolute authority with respect to the particular case decided, and the particular parties thereto. But as to the bearing of such appellate decision upon future cases there is a vast distinction. Under the civil law the decision of an appellate court is regarded as of no binding force outside of the particular litigation in which it was rendered. A question may be prosecuted through all the various tribunals, and eventually be decided by the highest court in their system. When, however, at any future time the same identical question again comes before the inferior court for determination as between different parties, it would be at perfect liberty to entirely disregard the opinion of the appellate court and decide this second case in accordance with what it deemed to be the law. Such conduct would be regarded with horror when viewed in the light of our jurisprudence. But when we carefully consider the subject, we find that the distinction is caused merely by virtue of the difference in theory of the two systems of jurisprudence. In the civil law, every man is considered to be entitled as a matter of right to prosecute his suit from the lowest up to the very highest court, and to have full and perfect freedom in the presentation thereof to each and every of those courts. It is considered to be an injustice to deprive him of this right, and, even though the same identical question has before been carried up to the highest tribunal and decided in a particular way, yet the latter litigant is entitled to have the judgment of the lower court given upon his suit, unembarrassed by the previous opinion of the appellate tribunal, and such subsequent suit pursues in an independent way the course which its predecessor in controversy took before it. Even in such appellate tribunal of highest authority, he would receive a judgment of an independent nature, unaffected by the previous decision of this same court.[24]

[21] 5 Pet. 280.

[22] Am. L. Rev., vol. 1, new series.

[23] Am. L. Rev., vol. 1, new series, p. 634; 82 Iowa, 714.

[24] 9 Harv. L. Rev.

The theories of jurisprudence in respect of the civil and English law are, however, essentially different. In English jurisprudence it is recognized that the primary purpose of an appellate tribunal is to settle and unify the law as administered by the various subordinate courts. In theory an appeal under such system is not considered to be the right of any litigant; the rights of a man are said to be fully protected by giving him a day in court for the trial of his case in the court below, with the opportunity by motion for new trial.[25] It is therefore the law under our system that, even apart from its intrinsic merits, the decision of a superior court is absolutely binding upon all inferior courts in every other case in which the same precise point comes before them for determination. There has, however, been recorded a well recognized exception to this doctrine, namely, that where the appellate tribunal decided the case either in ignorance of a statute, or where such decision was nothing more or less than a sheer blunder, the inferior courts are not bound to follow the same when the identical question again comes before them as between different parties for determination.[26]

As to the particular suit or case decided by the appellate court, however, notwithstanding there be manifest error in the decision from any cause whatever, even inadvertence, the inferior court would be powerless to give relief to the parties, because they had been given full opportunity to have the decision recalled or altered within the period regularly allowable for such purpose.[27] This principle is founded upon the doctrines of *res adjudicata*—while the doctrine applicable to the situation above referred to would be that of *stare decisis*. The distinction between the two situations is almost too obvious to require explanation. In the first, there was committed a plain blunder in which the subsequent litigant was not in anywise instrumental. It would not only be harsh and unjust, but would subserve no useful purpose of the law or of public policy, to perpetuate such a clear blunder and compel such subsequent and innocent litigant to go to the expense of an appeal to have declared by the appellate court a principle of law which was involved in no doubt or question of any kind whatever. Manifestly, this same reason cannot be applied to the parties who were before the court in the original litigation, and who had full knowledge of everything connected with it, and, if they failed to make a motion to have the higher court correct its blunder within the time allowed for such purpose, they must be bound by the doctrines of *res adjudicata*. There is no good policy in permitting an inferior to declare the decision of a superior court to have been decided in ignorance of a statute or as a clear blunder, merely because the parties were not diligent enough to have brought the question before the superior court—the proper court to determine the matter—within the time limited. But with respect to outside parties who become subsequent litigants, as will be readily appreciated, this reasoning can have no application, for they cannot be charged with any negligence in the matter. It is well to remark, however, concerning this question that a lower court is not to decide upon whether a sheer blunder has been committed, or a matter been decided in ignorance of a statute, merely because the tendency of his judgment is in that direction. In order to justify him in so doing, the ignorance of the statute or the sheer blunder must be one about which there cannot be raised the slightest doubt or question.

We take up now in regular course the question of the degree of weight to which the decision of a co-ordinate court is entitled. It may be stated that the English and American authorities are all substantially agreed upon its doctrines. The decision of one co-ordinate court, as a general rule, is in no sense absolutely binding upon another. They ought, however, to respect each other's decisions and in overruling them do so with reluctance and only when it is quite clear that the prior decision was an erroneous one. The importance of uniformity in the law as administered in the several circuits, both federal and state, is too great to be disregarded, even where the judges have a mere difference of opinion.[28] There are, however, several peculiar conditions under which the decision of a court of co-ordinate jurisdiction ought to be regarded as final by all other courts of like jurisdiction, even though the first case be considered by the latter tribunal of co-ordinate jurisdiction to have been erroneously decided. But such instances are very rare, and are to be restricted to the cases in which their necessity is apparent. They are only where rank injustice would otherwise be done; as, for instance, where, if the co-ordinate court before whom the second case came should decide contrary to the first co-ordinate court, a double judgment would by virtue thereof be recovered against the same defendant for exactly the same thing. In such cases, it is deemed better to follow the decision the first co-ordinate decision until modified by the appellate court.[29] It is conceived, however, that in such a case the subsequent tribunal should, if it did hold an opinion contrary to that of the first decision, have no hesitation in giving expression to its opinion, concluding its decision with a statement that it merely followed the previous decision as a matter of form. The appellate court would thus have the question brought before it in a fair light and without being influenced by either one of the lower courts more than the other, being entirely

[25] Powell App. Proc. 4.

[26] L. R. 2 Eq. 335; L. R. 8 Eq. 708; L. R. 14 Eq. 234; 1 Ch. D. 626; 3 Ch. D. 109; 9 Harv. L. Rev. 327; Powell App. Proc. 4.

[27] 3 How. 425; 94 U. S. 498.

[28] 46 F. 854; 1 Ohio C. C. Rep. 265; 47 F. 605; 16 Ch. D. 712.

[29] 1 Ban. & A. 573; 21 F. 283.

free to consider and determine the real merits of the question.

Having thus considered the degree of weight which can properly be accorded to the decision of a superior court by an inferior and by one co-ordinate court to another, our subject now brings us to a consideration of how far a previous decision of the very court itself is to be regarded as binding upon it and upon its successors. It is well settled in the United States that, except as will be hereinafter treated of with respect to settled property rights, there is no reason or logic, no principle of *stare decisis*, and no ground of public policy which prevents or should prevent the same court or its successor in office from laying down a different principle in future cases when it ascertains the previous utterance to have been erroneous. The supreme court of the United States has in a number of instances, notably in the admiralty jurisdiction and legal tender cases, refused to follow its previous decisions when ascertained to be erroneous. In the legal tender cases, the supreme court said: "Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. It is no unprecedented thing in courts of last resort * * * to overrule decisions previously made."

A very excellent case upon this subject is that of Leavitt v. Blatchford.[30] "That maxim (*stare decisis*) although entitled to great weight, does not furnish an absolute rule which can never be departed from. That it does not, the number of overruled decisions which have accumulated in the administration of the common law, abundantly proves. To depart from a decision is undoubtedly an act by which a court incurs a high degree of responsibility; and it should certainly be satisfied that its course is such that the future judgment of the enlightened profession of the law will approve its determination. But when it is satisfied that an erroneous determination has been made, and that too without a full consideration of the merits of the question decided; when it sees that to correct it will render void no one's honest acts, nor disappoint any just expectation; when in short it is fully persuaded that there is no reason why such a decision should again be made, except that it was once made before, then I think a court would be sacrificing substance to shadow if it refused to correct its error. Nor do I believe that in so doing a court would disturb the public confidence in the stability of its judgments. Courts are not inclined, any more than men out of courts, to admit that they have erred; and where the administration of justice is public and must proceed upon reasons assigned for every judgment, there is little danger from the exercise, under the responsibilities which necessarily attend its exercise, of the power which a court possesses to retract its steps when satisfied that an error has been committed."[31]

[30] 17 N. Y. 521.

[31] p. 543.

These doctrines are well recognized in England, but with a qualification which,—while certainly productive of much injustice,—is considered by their judges as being sound by virtue of fancied foundation in their constitution. And here I may well observe that this is a flagrant instance of the absolute uselessness of an unwritten constitution. When a constitution is at the complete mercy, for its declaration, of the tribunal, which is supposed to be bound by it, when they are to decide what it is, when they are to decide just how far it affects them, when they are to decide whether in certain cases it affects them at all, it must necessarily follow that that constitution can have no real value to the people it is designed to protect. The English courts recognize, just as our courts do, that they have a right to overrule their previous decisions when ascertained to be erroneous and no property rights have been built upon the strength of them; but the qualification added by them is, that such doctrine must have no application to courts of last resort. They say that the house of lords, when sitting as a judicial tribunal, is in all cases as much binding upon itself as upon any inferior tribunal; that the house of lords "cannot decide something as law one day and decide differently the same thing as law tomorrow;" claiming that if such were the case there would be an uncertainty in the law.[32] They even carry this doctrine, absurd in its inception, to limits which are beyond the utmost bounds of reason, beyond all conception of individual and collective justice, and beyond the farthest limits even of public policy. They even apply it to divided opinions, always regarded in the United States as no opinion at all—as the complete want of an opinion; and not only this, but in cases where the judges who were consulted at the time the house of lords rendered its divided opinion had complained of being hurried into reaching a conclusion without due time for deliberation. Such is laid down by the house of lords in the language of Lord Campbell, as follows: "If it were competent to me, I would now ask your lordships to reconsider the doctrine laid down in Queen v. Mills, particularly as the judges who were then consulted complained of being hurried into giving an opinion without due time for deliberation, and the members of the house who heard the argument and voted on the question were equally divided. * * * But it is my duty to say that your lordships are bound by this decision as much as if it had been pronounced *nemine dissentiente*, and that the rule of law which your lordships lay down as the ground of your judgment sitting judicially as the last and supreme court of appeal for the empire must be taken for law until altered by an act of parliament, agreed to by the commons and the crown as well as by your lordships. The law laid down as your *ratio decidendi* being clearly binding upon all inferior tribunals, and on all the rest of the queen's subjects, if it were not considered as equally binding upon your

[32] 3 H. L. C. 391; 8 H. L. C. 391.

lordships, this house would be arrogating to itself the right of altering the law, and legislating by its own separate authority.[33] The error of any such doctrine is too manifest to require discussion. Surely neither uniformity nor certainty in the law would be promoted by perpetuating an error which is known to exist—by perpetuating what is not law and has as its only reason for existence the fact that it was a court of last resort which committed the error. An error becomes no less an error by virtue of the fact that an appellate court committed it. The only possible end to be attained by such English doctrine is certainty and uniformity in wrong and erroneous doctrines—certainty and uniformity in the perpetuity of injustice to private and public rights—certainty and uniformity in the perpetuity of error which vitally affects the whole system of jurisprudence of the kingdom—and error and uncertainty in the very conception of law itself.

The true general doctrine of *stare decisis* applicable to the decisions of co-ordinate courts, as also those of the court itself or its predecessor, is clear and unmistakable. Blackstone's statement of the rule that "precedents and rules must be followed unless flatly absurd or unjust" was no doubt well suited to the time in which he wrote, but the true doctrines of *stare decisis* were then never truly comprehended. He wrote at a time when the British nation was just emerging from the doctrine of the absolute and unqualified inviolability of precedent under all circumstances, and so the first step to be taken toward advancement was necessarily a limited one. The true doctrine deducible from modern advancement and wisdom in jurisprudence is that, when a court is convinced that a prior decision was rendered in error—not when it is merely in doubt as to whether error was committed or not or when it has a mere opinion of its own that it was error, but when it is quite clear to such judge that an error was committed and he sees that to correct it will not render void any just act of the public or disappoint their just expectations; "when in short it is fully persuaded that there is no reason why such a decision should again be made except that it was once made before," then a court would be sacrificing substance to shadow if it refused to correct its error. If a judge is convinced that such an error is present, it is his duty to recede from the former decision, whether it shall have gone to the extent of being "flatly absurd or unjust" or not. Mr. Blackstone's doctrine may well be criticised as suited only to the time in which he wrote.

The next question with which we will have to deal in the proper treatment of our subject, is that with respect to the part which the decision of an equally divided court should take under our jurisprudence by virtue of the doctrine of *stare decisis*. I think I may lay it down as the true doctrine that where any decision is so rendered by a divided court it is thereby prevented from becoming an authority for other cases of like character, and that if the case comes before the court again it will exercise an independent opinion in the matter. The judgment of such divided opinion is, however, as conclusive and binding upon the parties to that suit as if rendered upon the concurrence of all the judges, such judgment constituting an affirmance of the lower court on account of the burden upon the appellant or plaintiff to establish his case and his failure so to do.[34] In the case of Durant v. Essex,[35] Mr. Justice Field, speaking for the United States Supreme Court, said: "The statement which always accompanies a judgment in such cases, that it is rendered by a divided court, serves to explain the absence of any opinion in the case, and prevents the decision from becoming an authority for other cases of like character. But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." This doctrine is fully shared by our English brothers across the water, with the exception however that they refuse to apply it to their court of last resort, and they base such exception upon the theory that otherwise there would be an uncertainty in the law. It is needless for me to again discuss this question, as I have hereinbefore shown the error of such proposition with respect to decisions of the house of lords which are not of a divided character and have been erroneously decided. In such cases, as a general rule, there ought to be no reason why the house of lords should not correct its error just the same as any other tribunal. And certainly there would seem to be even more reason for receding from a divided opinion, an opinion which is the very embodiment of the complete absence of any opinion whatever, when ascertained to have been erroneous.

I may therefore well dismiss this question from our discussion, and pass on to a consideration of the doctrines of *stare decisis* which are applicable to settle business rules and property rights. I may begin by stating that the main object and purpose of *stare decisis* is not to completely close the path of reason and investigations and this truth must demand for itself recognition when we recollect that there are thousands of cases in the English and American books of reports which have been overruled, doubted or limited in their application. The records of many of the courts of both this country and England are replete with hasty and crude decisions, and such cases ought to be examined without fear and revised with reluctance, rather than to have the character of our law impaired and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions cannot always be conclusive evidence of what the law is. Wisdom is not found so much in a multitude of cases as in good cases.

[33] 9 H. L. C. 338.

[34] 11 Wheat. 59.

[35] 7 Wall. 107.

The Revision of a decision, however, often resolves itself into a question of expediency, in other words, public or sound policy, taking as its basis for consideration and determination the importance of certainty, and the amount thereof, which should be contained in the rule and the extent to which property rights would be affected by a change. Lord Mansfield has well observed that the certainty of a rule was often of much more importance to mercantile cases than the reason of it, and that a settled rule ought to be observed for the sake of property. On the other hand, we find many cases where the decisions do not constitute a business rule and where a change would invalidate no settled property rights or business transactions conducted upon the faith of the first adjudication. As an instance, take a case involving personal liberty. A party restrained of his liberty claims to be entitled to his freedom by virtue of some constitutional provision. The court erroneously dicides against him. It need not, for the sake of my illustration, however, have been a constitutional question. Now suppose afterwards the same question arises again. To change such a decision would destroy no rights acquired in the past. It would give better protection to rights in the future.[36] The doctrine with respect to property rights and business rules, however, may be said to be that the courts are as firmly bound as the pagan deities were supposed to be bound by the decrees of fate. In such cases, if judicial decisions were to be lightly disregarded, we would disturb and unseat the great landmarks of property. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; people can venture to buy and trust and deal with each other; and so where the title to property has been acquired or a business rule settled by the public upon the faith of a decision of a court of last resort they will not afterwards be permitted to be disturbed, reversed or tampered with.[37]

It must be clearly borne in mind in this connection that common error can not be raised to the dignity of law when it has only been declared to be law by a judicial tribunal of inferior jurisdiction. The decisions of the circuit courts can not be regarded as establishiug a rule of property to which it is the duty of the higher court to adhere under the doctrine of *stare decisis*.[38] The reason of this is obvious. The business rules and property rights of our country are sacred to the people. They are next in importance to their lives and their liberties. We must have a property rule which will correspond in some degree to that sacredness of the rights which it is sought to protect. We must have a property rule which will serve the purposes for which it was made. Our inferior courts can not be relied upon as possessing a degree of learning sufficient for such a vast undertaking. We can not have built up among us and perpetuated among us by judicial decision any binding property rule unless that rule can be considered as possessing a reasonable probability of being sound. We must understand that every time a property rule upon grounds of public policy has to be upheld notwithstanding it has been found to have been erroneously laid down, some individual injustice is necessarily done. And so we lay down the wise rule that the public can not place implicit reliance in framing their titles and transacting their business upon any decisions other than those of last resort. If they rely upon the decisions of inferior courts, they must take the consequences upon themselves. And it is to be further observed that, the decision of a divided court being really no decision at all, the public can not build up their property rights upon the strength of it and afterwards claim the right to have it upheld on that account, and this even though such divided opinion shall have been that of a court of last resort. It is also well to remember in this connection that by upholding an erroneous decision upon grounds of public policy to prevent the unseating of property rights acquired upon the strength of it, we are not perpetuating a breach in the symmetry of the law. The legislature has full power to embody the true principle in the administration of the law for the future benefit of society. But what we do declare is that justice must be meted out to such parties who have relied upon the erroneous doctrine in past times, and while a temporary breach in the symmetry of the law (distinguished from symmetry of practice) is perhaps acknowledged and acquiesced in, yet the sound policy and the very necessity of permitting it is unquestioned.

Before concluding my subject, it is desirable that I should refer to one important qualification to the general doctrine thus laid down concerning settled property rights. It is, that an erroneous decision upon a constitutional question can not be supported under any circumstances. The constitution of a country, controlling as it does the whole scope of national and internal existence, is too sacred to admit of giving effect to any erroneous conception of it. The constitution is not a temporary creation. It was not given existence for a day. It plows onward in its majesty throughout the course of time, throughout ages and ages,—even unto the end of the world. And so the qualification may be laid down in the clear and forcible words of the Supreme Court of the United States: "Manifestly, as this court, clothed with the power, and entrusted with the duty to maintain the fundamental law of the constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene."[39] As well said, in the case of Willis

[36] 15 Wis. 691.

[37] 70 U. S. 732; 128 U. S. 526; 3 Wall. 332; 15 Ch. D. 335; 64 Ill. 488; 47 Ind. 283; 57 Miss. 171; 44 Mo. 204; 1 Ohio St. 362; 27 Ala. 238.

[38] 64 F. 553; 34 N. J. Eq. 438.

[39] 157 U. S. 429.

v. Owen,[40] the rule of *stare decisis* applies when a decision has been recognized as a law of property, and conflicting demands have been adjusted, and contracts made with reference to and on the faith of it, but not to questions involving the construction and interpretation of the organic law, the structure of the government, and the limitations upon the legislative and executive power as safeguards against tyranny and oppression.

To briefly recapitulate, the correct doctrines of *stare decisis* may be laid down as follows:

(1) That its doctrines only arise upon decisions directly upon points in issue, and that such point or points must not only have been merely involved as a fundamental issue but must either have been argued by counsel or have been fully investigated and considered by the court.

(2) That its doctrines have no application to the decisions of foreign states or countries, except in so far as the statute of one country has been adopted by another, in which event the decisions of courts of such other country rendered previous to such adoption would determine the interpretation and meaning of the statute, or except also in so far as the decisions of a parent state or country was rendered prior to the separation in which event they are considered as though they were rendered by the newly constructed government.

(3) Decisions of appellate courts are of absolute authority in the subordinate courts of the same jurisdiction, no matter how much the latter may differ in their conclusions, unless in a subsequent case it clearly appears (which is ordinarily not supposable) that the decision of such appellate court was either rendered in ignorance of a statute or that it was a plain blunder.

(4) Decisions of one co-ordinate court are entitled to be respected by all others in the same jurisdiction, and in peculiar circumstances may be regarded as absolutely binding, leaving the appellate court to decide the question; but, as a general rule, while co-ordinate courts ought to follow each other's decisions where there is an equipoise of doubt upon the question and in all cases unless it is quite clear that such prior decision was rendered in error, yet, when such court is convinced that a prior decision was erroneous, there is no rule of *stare decisis* which prevents it from laying down the true rule of law. Such court should never do so, however, merely because its opinion may have a tendency to a different conclusion from that reached by the prior decision.

(5) A court may recede from its own previous decisions or those of its predecessors when ascertained to be erroneous (except as regards business rules and property rights settled upon the faith of decisions on which the public had a right to rely), but in so receding the limitations with respect to co-ordinate courts likewise apply.

(6) The opinion of a divided court is to be regarded as the entire want of an opinion — and therefore is not a decision within the meaning of *stare decisis*.

[40] 43 Tex. 41.

(7) That where rules of business or property rights have been settled upon the strength of a previous decision, their rights must not be disturbed, and the proper remedy for correction of like error in future times is by resort to the legislature; but that no decision can be regarded as a basis for establishing a business rule or rule of property except when rendered by a court of last resort.

(8) Constitutional questions are unaffected by the doctrines of *stare decisis*, even though property rights have been settled upon the faith of a prior erroneous interpretation of such constitutional provisions.

In conclusion, I would remark that if there is anything human in all the wide world that should inspire mankind with hope, hope in his personal security, hope in the enjoyment of life, liberty and the pursuit of happiness, hope in all that makes life worth living, it should be found in our courts, in an advanced system of jurisprudence,—a system of jurisprudence which gathers together the collective wisdom of ages, a jurisprudence which makes clearer the pathway to higher enlightenment, a jurisprudence which attains to the highest degree possible for humanity the blessings of that uniform, harmonious system of law which is ever our highest ideal—a system of jurisprudence which recognizes the true doctrine of *stare decisis*.

Much has been said among the lawyers of our present day concerning a supposed inferiority in our modern judges as compared with those of earlier times. And they ascribe this supposed inferiority to the recognition of precedent as an authority, and they would have us back in the good old times when all the law was contained within the breasts and reason of the judges. They, however, fail to appreciate the real cause of this seeming inferiority. No one would ever think for a moment of depriving our judges of this all-important, all-embracing, beneficial power of reasoning to which reference is thus made. It is the surest guide to higher attainments in the perfection of the law. But, manifestly, we cannot accept as law, we cannot accept in our decisions, we cannot accept as the administration of justice the reason and preferences, ever changing as they are, of the judges who from time to time make up our courts. What we must attain, and can only make practical use of, is the collective wisdom of them all. While we are always advancing in knowledge and in learning and in wisdom, we must realize the importance of uniformity in our jurisprudence. We must realize that in certain cases the very reason of a rule of law itself is not as important to humanity as the uniformity of that rule no matter what the rule itself might be. We must realize that always and in all cases uniformity is to be preferred to discord and confusion, and wherever there is an equipoise of doubt upon a question or where there is no real reason for declaring a different principle to be law, a prior decision ought to be followed.

The real cause for the existence of an inferiority in our decisions of to-day as compared with those of former times is not to be found in any inferiority of our system of jurisprudence, but in the failure of our judges to understand and appreciate that jurisprudence as it is — to recognize the true principles of *stare decisis*. The great discordancy now prevalent in our books of reports (of course, not here considering the discordancy between decisions of different states and countries), is due almost wholly to a lack of frankness. They either seem to think that the doctrines of *stare decisis* do not admit of their confessing a previous error or else they have too much self-pride to let anyone know that they had committed an error. Many decisions of the highest courts can be pointed out where their previous decisions are overruled, but either without mentioning such fact or while mentioning it, professing not to do so. Such practice is a disgrace to the calling of any judge; such practice causes our precedents to assume the shape of an unintelligible mass of arbitrary rules; such practice destroys the sole value of our courts and of the law itself; such practice draws our rights and our properties into a meaningless game of chance, unaccompanied by the last vestige of collective or distributive justice. Let our judges appreciate that if they have committed an error in past times, it is better to openly and candidly confess it rather than to draw all sorts of distinctions in order to try in some manner to justify what they know is without true justification. Let them acknowledge that they have erred in the past, but let them do all they can to correct that error in the future. Let them absolutely overrule a previous decision, when ascertained to have been erroneous, except where it affects settled property rights and even then let them do so upon constitutional questions rather than that error should supervene. Let them admit that because they have erred in the past is no reason why they should perpetuate such error in the future. Let us have our judges understand and appreciate the true principles of *stare decisis*, make its doctrines statutory if you will, but let there be a uniform recognition of its doctrines, and let the administration of our law be only in accordance therewith. Then, and then only, will we have a system of jurisprudence which is worthy of our law; then, and then only, will we have a clearness of principle which will be the pride and boast of our people; then, and then only, will we have an administration of the law which attains for humanity a good share of its blessings and uniformity; and then, and then only, can there be administered to our people, can there be enjoyed by our nation, can there be acknowledged by the world, that if anything on earth is pure, anything on earth is noble, anything on earth is divine, is clothed with the garments of justice and of honor, it is the law itself.

GEORGE EDWARD SULLIVAN.

Washington, D. C.

FIRE INSURANCE — INCREASE OF HAZARD — FORFEITURE — WAIVER — JURY.

ORIENT INSURANCE CO. v. McKNIGHT.

Supreme Court of Illinois, June 19, 1902.

1. Where in an action on a fire policy on cornerib filled with corn, the defense was that the hazard had been increased by insured by shelling his corn with a steam cornsheller set near the cribs, and that the policy had become void under a provision for a forfeiture for any increase of the hazard, whether the shelling of the corn in the manner adopted constituted an increase of hazard resulting in the loss was a question of fact for the jury.

2. Where a fire policy provided that any increase of the hazard by the insured should render the policy void, and that none of the provisions of the policy could be waived except by writing attached to the policy, failure of the insurer to object, after notice thereof, to an increase of the hazard by the insured, until after loss occurred, constituted a waiver of the provision for forfeiture, though there was no waiver in writing attached to the policy.

CARTER, J. The appellee obtained a judgment against appellant on its policy insuring certain cribs of corn belonging to appellee from loss by fire. The judgment was affirmed by the appellate court, and the appellant company took this, its further appeal.

Appellee had been engaged in shelling the corn with a steam cornsheller, and late at night, on or about September 14, 1899, the cribs took fire, and they and the corn in them were destroyed. The policy contained the following provisions: (1) That the entire policy should be void if the interest of the insured in the property be not truly stated therein; (2) that the entire policy should be void if the hazard be increased by any means within the control or knowledge of the insured; (3) that the entire policy should be void if the interest of the insured be other than unconditional and sole ownership; and (4) that "this policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed herein or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The principal defense was that in shelling his corn with a steam sheller set near the cribs the hazard was increased by the insured, and that the policy thereby became void under the second condition of the policy above set out. While not

conclusive, there was evidence to prove that the fire originated from the engine, and that the hazard was increased by shelling the corn in the manner adopted. But these were questions of fact which have been finally disposed of by the judgment of the appellate court, and, although appellant asked the court to instruct the jury to find for the defendant, we would not be authorized to say, as a matter of law, under all the evidence, that the hazard was increased and that the instruction should have been given. But, even if the hazard was increased in violation of said second provision of the policy, there was sufficient evidence upon which the jury were authorized to find that appellant had waived this provision. The plaintiff testified that he notified the defendant's agent when about to begin the work of shelling and shipping the corn that he intended to shell it with a steam sheller, and that the agent said it would be all right. Such waiver was not written upon or attached to the policy, in compliance with its fourth provision, but we have held that such a provision may also be waived. Insurance Co. v. Hart, 149 Ill. 513, 36 N. E. Rep. 990; InsuranceCo v. Dowdall, 159 Ill. 179, 42 N. E. Rep. 606; Insurance Co. v. Caldwell, 187 Ill. 73, 58, N. E. Rep. 314. Such provisions, being for the benefit of the company, may be waived by it, and when having knowledge of the fact it should not be permitted to retain the money of the insured and treat the policy as in full force until a loss occurs, and then for first time seek to avoid the policy. Counsel for appellant have referred to cases holding otherwise, including Northern Assur. Co. v. Grand View Building Assn. (decided by the Supreme Court of the United States at its October term, 1901, by a divided court), 22 Sup. Ct. 133, 46 L. Ed.; but we have adopted a different rule in this state, and it must be applied in this case.

Judgment affirmed.

NOTE: *Increase of Risk as Ground for Forfeiture of a Policy of Fire Insurance.*—Provisions against increasing the risk is incorporated in nearly all policies of insured. They are made for the protection of the insurer and are somewhat liberally construed in his favor. Thus where a policy of fire insurance contains such a provision making the policy void if any unauthorized hazardous trade is carried on in the building, or if in any other way the risk is increased, the policy is avoided by the fact that such trade was carried on, or such risk increased, no matter what was the cause or origin of the fire. Howell v. Equitable Society, 16 Md. 377; Hobby v. Dana, 17 Barb. 111; Manufacturers' Ins. Co. v. Kimble (Pa.), 6 Wkly. Notes Cas. 234, 27 Pittsb. Leg. J. 135; Gasner v. Insurance Co., 13 Minn. 483; Martin v. Insurance Co., 85 Iowa, 643, 52 N. W. Rep. 534.

What is an increase of risk? A mere change of use, unless forbidden, will not increase the risk. German Insurance Co. v. Hart (Ky. 1894), 16 Ky. Law Rep. 344. But if the new use is one for which a higher premium is exacted, it is an increase of risk. Planters' Ins. Co. v. Rowland, 66 Md. 236, 7 Atl. Rep. 257. The use of a store for auction purposes, however, unless specified, is not an increase of risk. The risk on a building containing a printing press is increased by the addition of a steam engine and a furnace. Robinson v. Insurance Co., 27 N. J. L. 134. Where the change in use is to one for which the same rate is asked there is no increase of risk. Smith v. Insurance Co., 32 N. Y. 399. In the absence of any special provision it has been held that the lighting a building with gasoline is not devoting it to a "more hazardous business." Mutual, etc., Ins. Co. v. Shoe Factory, 80 Pa. St. 407. Nor does the fact that the owner of a building leases it to one who fails to occupy it, increase the risk. Hawkes v. Dodge, etc., Ins. Co., 11 Wis. 188. Nor does the closing up of the premises for 26 days prior to the fire effect the risk. O'Brien v. Ins. Co., 38 N. Y. Super. Ct. 517. But the abandonment of a building and its unauthorized occupation by another has been held to increase the risk. Western Assur. Co. v. McPike, 62 Miss. 740.

The general rule on this question, however, is that whether alteration or additions, made to a building insured against fire, or changes in its use or environment, increase the risk or not, is a question of fact for a jury to determine. Curry v. Ins. Co., 10 Pick. (Mass.) 525, 20 Am. Dec. 547; Albion Lead Works v. Ins. Co., 2 Fed. Rep. 479; Lockwood v. Assur. Co., 47 Conn. 553; Lattomus v. Ins. Co., 3 Houst. (1867) 404; North British, etc. Ins. Co. v. Steiger, 13 Ill. App. 482; Thayer v. Ins. Co., 70 Me. 531; Collins v. Insurance Co., 95 Iowa, 540, 64 N. W. Rep. 602; Pool v. Ins. Co., 91 Wis. 530, 65 N. W. Rep. 54; Peet v. Ins. Co., 1 South Dak. 462, 47 N. W. Rep. 532; Manheim, etc. Ins. Co. v. Thompson (Pa. 1885), 1 Atl. Rep. 370; Harris v. Ins. Co., Wright (Ohio), 548; Eager v. Ins. Co., 71 Hun, 352 affirmed, 148 N. Y. 726, 42 N. E. Rep. 722; Schenck v. Ins. Co., 24 N. J. L. 447; Anthony v. Ins. Co., 48 Mo. App. 65; Parker v. Ins. Co., 76 Mass. 302; Schaeffer v. Ins. Co., 80 Md. 563, 31 Atl. Rep. 317, 45 Am. St. Rep. 361.

Failure to Act Upon Knowledge of a Breach of the Conditions of a Policy as Affecting the Insurer's Right to Forfeit the Policy. — Where an insurance company has notice of changes affecting the risk or breach of the conditions of the policy, and fails to cancel the policy, it will be deemed to have waived a forfeiture. Fireman's Fund Co. v. Shalom, 80 Ill. 558; Nedrow v. Ins. Co., 43 Iowa, 24; Troger v. Ins. Co., 31 La. Ann. 235; Phœnix Ins. Co. v. Coomes (Ky. 1893), 20 S. W. Rep. 900; Anthony v. Insurance Co., 48 Mo. App. 65; Osterloh v. Ins. Co., 60 Wis. 126, 18 N. W. Rep. 749; Phœnix Ins. Co. v. Boyer, 1 Ind. App. 329, 27 N. E. Rep. 628; Eagle Fire Co. v. Trust Co., 44 Neb. 380, 62 N. W. Rep. 895. Some authorities, however, do not agree with this statement of the law, and hold that the failure of the company to cancel a policy is no waiver of its right to rely upon the breach. West End Land Co. v. Ins. Co., 74 Fed. Rep. 114; Johnson v. Ins. Co., 41 Minn. 396, 43 N. W. Rep. 59. The mere knowledge of the agent of the breach of the policy, which is not communicated to the company has been held by some courts not to amount to a waiver. West End Land Co. v. Ins. Co., 74 Fed. Rep. 114; Robinson v. Fire Assn., 63 Mich. 90; Taylor v. Ins. Co., 98 Iowa, 521, 67 N. W. Rep. 577. This is controverted, however, in Farmers', etc. Ins. Co. v. Nixon, 2 Colo. App. 265, 30 Pac. Rep. 42; Piedmont Ins. Co. v. Young, 58 Ala. 476, 29 Am. Rep. 770; Crescent Ins. Co. v. Griffin, 59 Tex. 509; Hartford, etc. Ins. co., 17 Tex. Civ. App. 317, 26 S. W. Rep. 928; Northern Assur. Co. v. Bldg. Assn. (U. S. 1901), 22 Sup. Ct. Rep. 133.

Where, by the policy, an agent cannot waive any provision of, the policy, which can only be done, according to the terms of the policy, by the written con-

sent of the company, there is some conflict of authority, whether the knowledge of the company is a waiver of these conditions. Some authorities hold in the affirmative: Meadow's Guardian v. Admr. (Ky. 1891), 13 Ky. Law Rep. 495; Cromwellor Ins. Co. 47 Mo. App. 109; Haas. v. Ins. Co., 49 Hun. 272; Imperial, etc., Ins. Co. v. Dunham (Pa. 1886), 3 Atl. Rep. 579; Crescent Ins. Co. v. Griffin, 59 Tex. 509. Some hold to a contrary rule. West End Land Co. v. Ins. Co., 74 Fed. Rep. 114; Robinson v. Fire Assn., 63 Mich. 90, 29 N. W. Rep. 521; Northern Assur. Co. v. Bldg. Assn. (U. S. 1901), 22 Sup. Ct. Rep. 133. In this last case three judges dissented. Nevertheless, it will be found to contain a most careful and exhaustive review of this interesting question.

ALEXANDER H. ROBBINS.

HUMORS OF THE LAW.

Wife's Right to Search Husband's Pockets.—A St. Louis police justice has recently decided in effect that a wife has the right to run through her husband's pockets *ad libitum*. Henry Shauer was brought before the judge charged with disturbing his wife's peace. Shauer defended his treatment of his wife by stating that she had gone through his pockets. Mrs. Shauer explained that Mr. Shauer frequently imbibed too freely, and it became necessary to search his pockets in order to keep the larder supplied. The judge decided that she had not exceeded her rights. To establish the general principle, however, that the wife's right in this respect is absolute, would work considerable hardship on the husband, as he could not retaliate in kind, since a woman's pockets, if she has any, have never been discovered by man.—*Law Notes.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCOUNT—Judgment.—A judgment which merely directs defendant to account is bad.—Silliman v. Smith 76 N. Y. Supp. 65.

2. ALTERATION OF INSTRUMENTS—Indorsement of Payment.—Erasure of indorsements of payment, entered by mistake, does not avoid the note.—Lau v. Blomberg, Neb. 91 N. W. Rep. 206.

3. ALTERATION OF INSTRUMENTS—Interlineation.—No proof need be given that an interlineation in a written instrument was made before its execution, unless the alteration is a suspicious one.—Rosenbloom v. Finch, 76 N. Y. Supp. 902.

4. ANIMALS—Agister's Lien.—An *agister's* lien is not, as between the parties or third persons having notice thereof, lost by change of possession, where there were no circumstances indicating an intent to waive it.—Becker v. Brown, Neb., 91 N. W. Rep. 178.

5. APPEAL AND ERROR—Discretion of Presiding Justice.—The discretion of the presiding justice in ruling on a motion for new trial is not generally subject to revision on exception or appeal.—Hayward v. Langmaid, Mass., 63 N. E. Rep. 912.

6. ARBITRATION AND AWARD — Lien on Land. — An award returned to court must be entered up as a judgment after rule or notice, in order to constitute a lien or have writ of execution.—Turner v. Stewart, W. Va., 41 S. E. Rep. 924.

7. ARREST—By Private Person —Under Code Cr. Proc. § 183, a private person may arrest for a misdemeanor committed or attempted in his presence.—Tobin v. Bell, 76 N. Y. Supp. 425.

8. ATTACHMENT—Amendment of Return.—The court has power to allow an officer to amend his return of an attachment writ, especially as to matters which occurred after entry thereof.—Harding v. Riley, Mass., 63 N. E. Rep. 883.

9. BAIL—Allowance After Conviction.—After conviction of felony, there can be no allowance of bail, unless for some extraordinary cause not growing out of the criminal act.—*Ex parte* Hill, W. Va., 41 S. E. Rep. 903.

10. BANKRUPTCY — Allowance to Assignee. — An assignee for benefit of creditors, on bankruptcy proceedings within four months, is entitled to an allowance for the actual and necessary expenses incurred in perserving the property while in his possession.—*In re* May, U. S. D. C., S. D. W. Va., 114 Fed. Rep. 600.

11. BANKS AND BANKING—Liability of Stockholders.—The decision of the comptroller of currency as to the necessity of enforcing the personal liability of national bank stockholders held conclusive.—Waldron v. Alling, 76 N. Y. Supp. 250.

12. BILLS AND NOTES—Gambling Debt.—Where it was pleaded in defense to an action on a note that a part of the consideration was a note given for a gambling debt, the burden of proving that fact was upon the defendants —Pritchett v. Sheridan, Ind., 63 N. E. Rep. 865.

13. BONDS—Erection of Building. — In an action on bond by vendee for erection of building, evidence as to worth of premises if contract had been performed held proper.—Sachs v. American Surety Co., 76 N. Y. Supp. 355.

14. BOUNDARIES — Continuous Line. — A line as a boundary should be construed to mean a continuous line.—Jackson v. Welsh Land Assn. W. Va., 90 N. W. Rep. 920.

15. BROKERS—Commission.—An agreement to pay a broker a commission from the proceeds of a loan gives him no right thereto, where the loan is rejected by the attorneys for the lender.— Hess v. Eggers, City 76 N. Y. Supp. 980.

16. CARRIERS—Burden of Proof.—Where defendant admitted that plaintiff was entitled to actual damages, stating the amount, judgment would have gone against it if no evidence had been offered, and therefore the burden of proof was upon it.— Louisville & N. R. Co. v. Champion, Ky., 68 S. W. Rep. 143.

17. CERTIORARI — Motion to Dismiss. — A motion to dismiss a writ of *certiorari*, being in the nature of a demurrer, may be made and granted before return has

been made to the writ. — People v. Peck, 76 N. Y. Supp. 328.

18. CHATTEL MORTGAGES — Release by Mistake. — A mistaken entry of satisfaction of a chattel mortgage on the margin of the record held revokable by cancellation before it was known to the mortgagor or his assignee.—Frost v. George, Mass., 62 N. E. Rep 888.

19. COLLISION—Presumption of Fault. — A steamship unincumbered will be presumed in fault for a collision with a tug or tow, unless fault in the latter is shown.—The Jamestown, U. S. D. C., Va., 114 Fed. Rep. 593.

20. CONSTITUTIONAL LAW — Statute Taking Away Salary.—Act Jan. 22, 1902, providing that Act April 25, 1901, attaching a salary to office of alderman, should not be construed as conferring a salary for any part of the year 1901, held void as affecting vested rights.—Young v. City of Rochester, 76 N. Y. Supp. 224.

21. CONTEMPT — Fictitious Bond. — Under Code Civ. Proc. § 14, subds. 2, 8, a court of record has power to punish an attorney for contempt in knowingly procuring the court's approval to a worthless bond for an order of arrest.—Nuccio v. Porto, 76 N. Y. Supp. 96.

22. CONTINUANCE— Depositions. — Plaintiffs held entitled to a continuance to enable them to cross-examine defendants, whose depositions were taken at a place 20 miles from where any of the plaintiffs resided and nearly 40 miles from the residence of their attorney.—Chenault v. Spencer, Ky., 68 S. W. Rep. 128.

23. CONTRACTS—Action for Breach. —Where plaintiff's action was on a contract to supply certain labor and material, and was not on *quantum meruit*, evidence of the value to the defendant did not affect the right of recovery.—Craig v. French, Mass., 63 N. E. Rep. 893.

24. CORPORATIONS — Mortgages. — A trust company held not chargeable with the knowledge of its president as to the purpose of a mortgage, subsequently assigned to it.—Tate v. Security Trust Co., N. J., 52 Atl. Rep. 313.

25. CORPORATIONS — Ultra Vires Acts.—A corporation, receiving money under a contract entered into by it, is estopped from asserting that it is *ultra vires*. — Rehberg v. Tontine Surety Co., Mich., 91 N. W. Rep. 132.

26. COSTS — Witness Fees.—Attendance of a witness at an attorney's office, in pursuance of a summons, held a sufficient attendance at court to authorize the taxation of witness fees. — Reid V. Wright, Mass., 63 N. E. Rep. 886.

27. COURTS — Principal and Surety. — Where a claim against a principal is within the jurisdiction of the court, the fact that the extent of the liability of two sets of sureties was not within the jurisdiction is immaterial.—Robinson v. Chamberlain, Tex., 68 S. W. Rep. 203.

28. CRIMINAL LAW — Preliminary Hearings.—A second preliminary hearing on a charge of felony may be had when the first has resulted in the discharge of the accused.—Van Buren v. State, Neb., 91 N. W. Rep. 201.

29. CRIMINAL LAW — Responsibility for Crime. — The test of responsibility for crime is the capacity to understand the nature of the act and the ability to distinguish between right and wrong as to such crimes. — Schwartz v. State, Neb., 91 N. W. Rep. 190.

30. CRIMINAL TRIAL — Absence of Counsel. — Defendant's attorney, who alone was familiar with the facts, having been arrested after the jury was completed, there should have been continuance or postponement. —Scott v. State, Tex., 68 S. W. Rep. 171.

31. CRIMINAL TRIAL — Argument of Counsel.—A statement of the prosecutor in a criminal case in his argument that an acquittal would be a miscarriage of justice held not ground for exception.—State v. Barker, N. J., 52 Atl. Rep. 284.

32. CRIMINAL TRIAL — Misconduct of Jury.—A conviction of a homicide will not be reversed merely because the jury may have discussed or remarked about the testimony of some of the witnesses before the final conclusion of the evidence. — Scott v. State, Tex., 68 S W. Rep. 177.

33. DAMAGES — Pleading. — Exemplary damages may not be claimed *eonomine* in the declaration. — Richmond Passenger & Power Co. v. Robinson, Va., 41 S. E. Rep. 719.

34. DEATH—Seven Years' Absence. — Under 1 Gen. St. p. 1187, creating a presumption of death from seven years' absence, the time of death is ordinarily presumed to be at the expiration of the seven years. — Burkhardt v. Burkhardt, N. J., 52 Atl. Rep. 296.

35. DEATH BY WRONGFUL ACT — Evidence.—Evidence of the wages which plaintiff earns is not admissible in action for death of his child. — Terhune v. Joseph W. Cody Contracting Co., 76 N. Y. Supp. 255.

36. ELECTION OF REMEDIES—Damages for Nuisance.—Where lessee is in open and notorious possession, that lease was unrecorded held no defense to an action by the lessee for a nuisance, for which defendant had settled with the lessor. — Dumois v. City of New York, 76 N. Y. Supp. 161.

37. EMINENT DOMAIN — Election. — Trial court, on a motion for a new trial in condemnation proceeding, held entitled to put the plaintiff to an election to reduce the verdict or submit to a new trial. — Meckes v. Pocono Mountain Water Supply Co., Pa., 52 Atl. Rep. 16.

38. ESTOPPEL—Partition.—Defendant in partition held not estopped to introduce an alleged will of plaintiff by the fact that he had previously attempted to establish another instrument as intestate's will. — Whitney v Whitney, N. Y., 63 N. E. Rep. 834.

39. EVIDENCE — Action for Injuries. — In an action against a town for injuries caused by a sidewalk obstruction, evidence of other obstructions at the same place at other times held inadmissible.—Town of Lewisville v. Batson. Ind. 63 N. E. Rep. 861.

40. EXCHANGES — Arbitration of Disputes. — A by-law of a chamber of commerce, providing for arbitration of business disputes and for suspension of a member for refusing to arbitrate, is not invalid, as ousting the courts of jurisdiction conferred upon them. — Evans v. Chamber of Commerce, Minn., 91 N. W. Rep. 8.

41. EXECUTORS AND ADMINISTRATORS — Effect of Inventory.—Neither a husband, acting as an executor of his wife, nor his personal representatives, can be concluded from showing that deposits, inventoried by him as belonging to her estate actually belong to him.—Dodge v. Lunt, Mass., 63 N. E. Rep. 891.

42. FALSE IMPRISONMENT—Arrest by Private Person.—In false imprisonment, that defendant detected plaintiff committing a crime and made the arrest, under Code Cr. Proc. § 183, is no defense, where plaintiff was not taken to a magistrate or delivered to an officer under section 186.—Tobin v. Bell, 76 N. Y. Supp. 425.

43. EXECUTORS AND ADMINISTRATORS—Taxes and Interest.—Administratrix, paying taxes and mortgage interest out of personalty, held entitled to be reimbursed by other heirs out of the realty.—*In re* Sworthout's Estate, 76 N. Y. Supp. 961.

44. FEDERAL COURTS—Appellate Jurisdiction.—Appellate jurisdiction of supreme court held exclusive, where suit involves construction of constitution of the United States, and jurisdiction of circuit court is invoked on that ground alone. — City of Seattle v. Thompson, U. S. C. C. of App., Ninth Circuit, 114 Fed. Rep. 96.

45. FIRE INSRRANCE — Subrogation. — An insurance company held not subrogated to the rights of the insured in a pooling arrangement whereby he received profits notwithstanding destruction of his property by fire.—Michael v. Prussian Nat. Ins. Co., N. Y., 63 N. E. Rep. 810.

46. FOOD—Police Power.—Pub. Acts 1901, No. 22, prohibiting sale of imitation butter, is a valid exercise of

the police power.—People v. Rotter, Mich., 91 N. W. Rep. 167.

47. FORGERY—Power to Receive Money.—A false writing, stating that one is authorized to collect for a certain newspaper, is within the statute making it forgery to falsely make "a letter of attorney or other power to receive money."—Leslie v. State, Wyo., 69 Pac. Rep. 2.

48. FORGERY — What Constitutes. — Where the false writing could by any possibility operate to the injury of another, it constitutes forgery.—Gordon v. Commonwealth, Va., 41 S. E. Rep. 746.

49. FRAUD—False Representations. — A complaint in an action for false representations by a seller is insufficient, in the absence of an allegation that the seller knew the falsity of the representations.—Van Pub. Co. v. Westinghouse, Church, Kerr & Co., 76 N. Y. Supp. 340.

50. FRAUDS, STATUTE OF—Pleading.—In an action on contract, plaintiff need not allege that it was in writing. —Dupignac v. Bernstrom, 76 N. Y. Supp. 381.

51. FRAUDULENT CONVEYANCES—Action to Set Aside.—In an action to set aside a conveyance by a creditor claiming under a judgment, the fact that such judgment was rendered before the same court is not ground for dispensing with proof thereof.—Amundson v. Wilson, N. Dak., 91 N. W. Rep. 37.

52. FRAUDULENT CONVEYANCES — Presumption of Fraud.—The fact that a conveyance is voluntary creates a presumption that it is in fraud of creditors.—Baker v. Potts, 76 N. Y. Supp. 406.

53. GAMING—Intent of Parties.—The illegal intent of one of the parties to a gambling contract will not avail unless the other party knew or ought to have known of such illegal purpose.—McCarthy v. Weare Commission Co., Minn., 91 N. W. Rep. 33.

54. GARNISHMENT—Money Pledged for Certain Purpose.—Purchase money, which by stipulation, is put in hands of trustee to apply to a certain purpose, held not subject to garnishment by prior creditor of seller.—Willis v. International Const. Co., Pa., 52 Atl. Rep. 5.

55. GIFTS—Husband and Wife.—The fact that a husband checked out money from one bank, and that it was afterwards deposited in another in the name of his wife, individually or as trustee, did not necessarily show that the money was a gift to her.—Dodge v. Lunt, Mass., 63 N. E. Rep. 891.

56. HABEAS CORPUS—Bail by Supreme Court. — The supreme court of appeals has jurisdiction to award a writ of *habeas corpus* for the sole purpose of obtaining bail in a felony case and to grant bail upon it.—*Ex parte* Hill, W. Va., 41 S. E. Rep. 903.

57. HEALTH OFFICERS—Private Property Appropriated for Pest House.—A qualified health officer of a county would have power to seize a private building in which to confine a smallpox patient without express authorization from the county board of health. — Brown v. Pierce County, Wash., 68 Pac. Rep. 872.

58. HIGHWAYS—Evidence.—Record made by highway commissioners, which, after defining course of a highway, concludes, "to be opened three rods wide," held not admissible to show width of the road.—Purdy v. Moore, 76 N. Y. Supp. 289.

59. HOMESTEAD — Showing Under General Denial.—Where, in a suit for possession of land, plaintiff claims under the deed from a husband thereto, the wife may show a homestead right under her general denial; no special plea being necessary.—Cawfield v. Owens, N. Car., 41 S. E. Rep. 891.

60. HOMICIDE—Res Gestæ.—On trial for murder, declaration of deceased, made immediately after he was mortally stabbed by the accused, to the effect that he was stabbed to the heart, held admissible as a part of the *res gestæ*.—State v. Gilbert, Idaho, 69 Pac. Rep. 62.

61. HUSBAND AND WIFE—Inchoate Interest in Mortgaged Property.—A wife's inchoate interest in real estate does not make her a principal on a note signed by her, with her husband, to pay his note secured by a mortgage on the real estate.—Andrysiak v. Satkowski, Ind., 63 N. E. Rep. 854.

62. INDICTMENT AND INFORMATION—Motion to Quash.—Motion to Quash because grand jury had examined accused's wife, among others, held properly refused.—State v. Coats, N. Car., 41 S. E. Rep. 706.

63. INFANTS—Avoidance in Part.—Where a minor purchases realty and gives a mortgage to one who pays the price, after becoming of age he cannot retain the realty without ratifying the mortgage.—Ready v. Pinkham, Mass., 63 N. E. Rep. 887.

64. INJUNCTION—Liability on Bond.—Where plaintiff discontinues injunction suit for reason arising after his injunction, held defendant was entitled to no damages on the bond.—Taylor Worsted Co. v. Beolchi, 76 N. Y. Supp. 379.

65. INSURANCE — Validity. — A policy insuring the "estate of A. B., deceased," is valid.—Magoun v. Fireman's Fund Ins. Co., Minn., 91 N. W. Rep. 5.

66. INTOXICATING LIQUORS—Consent to Issue Liquor Tax Certificate.—Placing signs on dwelling houses near saloon, in order to evade the consent required on application, for liquor tax certificate, held insufficient to change the character of the building.—*In re* Rasquin, 76 N. Y. Supp. 404.

67. JUDGMENT—Trustee's Accounting. — Trustees are not relieved from accounting to their successors for proceeds of a mortgage for which they never accounted by an adjudication that they had not misappropriated the same.—*In re* Appleton's Estate, Pa., 52 Atl. Rep. 12.

68. JUDICIAL SALES—Deduction From Purchase Price for Dower.—Announcement of counsel of assignee at judicial sale of assigned estate, and silence of creditors, held not to entitle purchaser to deduction from purchase price for dower interest of widow of assignor.—Snyder v. McLanahan, Pa., 52 Atl. Rep. 7.

69. JURY—Special Venire.—An objection to the panel of a jury in a criminal case that some of said jurors were summoned under a special venire on Sunday held properly overruled.—State v. Gilbert, Idaho, 69 Pac. Rep. 62.

70. JUSTICES OF THE PEACE—Change of Venue.—An order of a justice, granting a change of venue on an *ex parte* hearing and before the return day, is void.—Martin v. Mershon, Neb., 91 N. W. Rep. 180.

71. LANDLORD AND TENANT — Liability to Persons Visiting Tenants.—Party entering building to attend installation of lodge held not entitled to recover against the owner for injuries due to the insufficient lighting of the entrance.—Jordan v. Sullivan, Mass., 63 N. E. Rep. 909.

72. LARCENY—Property Stolen in Another State.—The bringing into the state of property stolen in another state is not larceny.—Van Buren v. State Neb., 91 N. W. Rep. 201.

73. LIBEL AND SLANDER — Currency of Slanderous Report. — In an action for slander, a question as to whether witness had heard any "rumor" as to the alleged slanderous statements having been made was proper.—Smith v. Moore, Vt., 52 Atl. Rep. 320.

74. LIFE INSURANCE — Rights of Beneficiary.—An insurance company held not liable to a trustee in bankruptcy of assured, though the policy had a cash surrender value, in the absence of a showing that the beneficiary had consented to the surrender. — Haskell v. Equitable Life Assur. Soc., Mass., 63 N. E. Rep. 899.

75. LIMITATION OF ACTIONS—Manner of Giving Credit. — The running of limitations against a note is suspended by partial payment, without regard to whether such payments are indorsed on the notes or new notes are executed for the unpaid balance. — Hamilin v. Smith, 76 N. Y. Supp. 258.

76. LIMITATION OF ACTIONS— Suit in Equity.—Where a suit in equity is based on a legal demand, the court is bound by the statute of limitation which govern an ac-

tion at law thereon. — Hale v. Coffin, U. S. C. C., D. Me., 114. Fed. Rep. 567.

77. MANDAMUS—Salary of Sheriff.—*Mandamus* will not lie to compel county supervisor to draw his warrant for sheriff's salary, where county treasurer has no funds. —McCaslan v. Major, S. Car., 41 S. E. Rep. 893.

78. MASTER AND SERVANT — Assumption of Risk. — Where a hammer was purchased from a reputable firm, the master did not owe the duty of inspecting it. —Dompier v. Lewis, Mich., 91 N. W. Rep. 164.

79. MILITIA — Constitutional Law. — P. L. 1900, p. 428, relating to the military and naval forces, if intended to create a state military force, not militia, would be unconstitutional. — Smith v. Wanser, N. J., 52 Atl. Rep. 309.

80. MORTGAGES—Bona Fide Assignees.—An assignee, taking a mortgage as collateral security for pre-existing debts, without delivering up the evidence of such debts, was not a purchaser for value. — Tate v. Security Trust Co., N. J., 52 Atl. Rep. 313.

81. MOTIONS — Order to Show Cause.—An order to show cause may be made returnable in more than eight days from the granting of the order.—*In re* Ferris, 76 N. Y. Supp. 159.

82. MUNICIPAL CORPORATIONS— Appointment by Outgoing Mayor.—An outgoing mayor, whose term of office expired at 12 o'clock, noon, January 1, 1902, could up to that hour make an appointment to any position which the mayor had a legal right to fill. — Bakely v. Nowrey, N. J., 52 Atl. Rep. 289.

83. NEGLIGENCE—Proximate and Remote.—The same test must be applied to the conduct of both parties in determining whether the cause of an action is proximate or remote. — Rider v. Syracuse Rapid Transit Ry. Co., N. Y., 63 N. E. Rep. 836.

84. NEW TRIAL — Trial of Causes Together. — If the court erred in submitting to the jury at the same time two cases being tried together, the remedy was by motion for new trial. — Sullivan v. Boston Electric Light Co., Mass., 63 N. E. Rep. 904.

85. PARTIES—Amendment After Trial.—Under Consol. Act, § 1296, a justice has no right, after both parties have rested, to amend by adding the name of a necessary party defendant who has never appeared or been served with summons.—Kest v. Kimmel, 76 N. Y. Supp. 949.

86. PARTITION—Lien on Realty or Proceeds Thereof.—Executor held not entitled to object that a claim of a third party against his decedent's estate was not adjudged a lien on the proceeds of a partition sale of the real estate.—Johnson v. Weir, 76 N. Y. Supp. 76.

87. PARTNERSHIP — Compensation.—Where a contract of partnership was entered into for the sale of certain land, that one partner made the sales and collected the proceeds did not entitle him to compensation, without a special agreement therefor.—Wisner v. Field N. Dak., 91 N. W. Rep. 67.

88. PERJURY—False Certificate. — Oath required by officer of foreign corporation by the laws of the foreign state held not to constitute purjury, for falsity, when taken in the state of New York.—People v. Martin, 76 N. Y. Supp. 953.

89. PERPETUITIES — Validity of Bequest.—A bequest considered, and held not void, as suspending the absolute ownership in the property bequeathed for a longer period than allowed by law.—*In re* Dippel's Will, 76 N. Y. Supp. 201.

90. PLEADING—Sufficiency of Amendment. — Whether amendment of complaint sets forth facts necessary to sustain recovery will not be determined on appeal from order allowing the amendment.—Thileman v. City of New York, 76 N. Y. Supp. 132.

91. PLEDGES — Accounting.—Where an agent was acting in a fiduciary capacity, held that, to maintain an equitable action for an accounting, he need not have a lien on the trust fund.—Underhill v. Jordan, 76 N. Y. Supp. 266.

92. PRISONS — Commitment.—The duty of the warden of city prison to serve one committed for vagrancy with a copy of an order within 24 hours of her commitment, as to the time of her discharge, determined.—People v. Warden of City Prison, 76 N. Y. Supp. 286.

93. PROCESS — Termination of Prosecution. — Where one is arrested under a criminal warrant for malicious injury to personalty, and not released until he abandons a claim of right to occupy a certain house, he has a right of action for abuse of process.—White v. Apsley Rubber Co., Mass., 63 N. E. Rep. 885.

94. PUBLIC LANDS —Illegal Contract. — Agreement by which a son made a timber culture entry, the expenses to be paid by his mother and he to convey the land to her, held illegal.—Fleischer v. Fleischer. — N. Dak., 91 N. W. Rep. 51.

95. QUIETING TITLE—Offer to Reimburse. — The complaint in an action to quiet title, containing no offer to reimburse the one in possession for permanent improvements, held insufficient.— Merrett v. Ritter, Ind., 63 N. E. Rep. 855.

96. RAPE—Sufficiency of Indictment. — Where an indictment sufficiently charged an assault, it was error to arrest judgment after verdict because the crime of rape was not correctly charged; the verdict being imputed to the matter correctly set out. — State v. Peak, N. Car., 41 S. E. Rep. 887.

97. REFERENCE — Judgment on Counterclaim.—Where an issue on a counterclaim is properly submitted to a referee, and his finding fails to show any disposition thereof, the judgment must be reversed. — Cable Flax Mills v. Early, 76 N. Y. Supp. 191.

98. RELEASE — Joint Tort Feasors. — Attorneys, after release of one of two joint tort feasors, cannot continue the action against the other for benefit of their lien. — Johanson v. City of New York, 76 N. Y. Supp. 119.

99. SALES — Acceptance of Goods. — Where one who purchased books of a particular description accepts books which do not comply with the contract, his remedy is by an action for breach of contract. — International Soc. v. Hildreth, N. Dak., 91 N. W. Rep. 70.

100. SUBROGATION — Note Made by Executor. — The payee of a note given by an executor for money borrowed to pay estate debts held entitled to be subrogated to the rights of the executor to enforce payment.—Hamlin v. Smith, 76 N. Y. Supp. 258.

101. TAXATION—Appraising for Transfer Tax.—In appraising for the transfer tax the assets of a deceased merchant, the domestic liabilities of his business should be deducted from the domestic assets thereof, regardless of a branch house in another state.—*In re* King's Estate, 76 N. Y. Supp. 220.

102. TELEGRAPHS AND TELEPHONES—Mental Anguish —A telegraph company was not liable for mental anguish for failure to deliver a message.—Sparkman v. Western Union Tel. Co., N. Car., 41 S. E. Rep 881.

103. TRUSTEES—Neglect of Duty.—Trustee for infants, failing to pay taxes and distribute assets among infants, removed therefor.—*In re* McKeon, 76 N. Y. Supp. 312.

104. USURY—Assignee of Contract.—The assignee of a contract cannot avail himself of the defense of usury.—Barney v. Tontine Surety Co., Mich., 91 N. W. Rep. 140

105. VENDOR AND PURCHASER—Action on Note.—An allegation, in the petition in an action on a note bequeathed to plaintiff, that testator's estate is solvent, is not equivalent to an allegation that there is no administration pending or necessary.—Laas v. Seidel, Tex., 67 S. W. Rep. 1015.

106. WORK AND LABOR—Quantum Meruit —Where services performed under a contract indefinite as to time were paid for to a certain date, and the employee retains such payment, he cannot therefore rescind the contract from the beginning and recover on a *quantum meruit*.—Forbes v. Appleyard, Mass., 63 N. E. Rep. 894.